

BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

CITY OF ILWACO,

Appellant,

v.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Respondent.

PCHB NO. 05-140

SUMMARY JUDGMENT

Appellant City of Ilwaco (City) is challenging the fecal coliform limits imposed in the Department of Ecology's (Ecology) renewal of its National Pollutant Discharge Elimination System (NPDES) permit governing operation of the City's wastewater treatment plant. Ecology filed a Motion for Summary Judgment seeking dismissal of the appeal. In considering the motion, the Board, comprised of William H. Lynch and Kathleen D. Mix reviewed the following:

1. Ecology's Motion for Summary Judgment.
2. Ecology's Memorandum in Support of Motion for Summary Judgment.
3. Declaration of Eric Schlorff with Exhibits 1-5.
4. City of Ilwaco's Opposition to Motion for Summary Judgment.
5. Affidavit of Nancy Lockett in Opposition to Motion with Attachments.
6. Ecology's Reply in Support of Motion for Summary Judgment.
7. Second Declaration of Eric Schlorff with Exhibit.

1 The matter was decided on the record without oral argument. Based upon the records and
2 files in the case and the evidence submitted, the Board enters the following decision.

3 Facts

4 The City of Ilwaco owns and operates a wastewater treatment plant that processes
5 wastewater collected from the City's sanitary sewer collection system as well as wastewater
6 from the Seaview Sewer District, Cape Disappointment State Park, and the Coast Guard Station
7 at Cape Disappointment. Following treatment at the Ilwaco wastewater plant, effluent is
8 combined with that of Jesse's Ilwaco Fish Company and discharged from an outfall into Baker
9 Bay. Baker Bay is a part of the Columbia River Estuary and it is very shallow where the
10 discharge occurs. (Declaration of Eric Schlorff, Ex. 2, p.3). Prior to the current NPDES permit
11 renewal, Ecology had classified the receiving water in Baker Bay as Class A freshwater.
12 (Declaration of Eric Schlorff ¶8).

13 When the Ilwaco NPDES Permit No. WA0023159 was ready for renewal, Eric Schlorff
14 of Ecology's Southwest Region Office Water Quality Program was assigned to write the permit.
15 In preparing the permit, Mr. Schlorff concluded that the receiving water was more appropriately
16 classified as marine water than freshwater. His initial analysis was based upon salinity data
17 collected from two stations in the Columbia River estuary. The average salinity readings from
18 the water samples were 21 parts per thousand (ppt) and 19 ppt. These readings exceeded the
19 salinity threshold in WAC 173-201A-060(2) for designation as marine waters. Accordingly, Mr.
20 Schlorff established fecal coliform limits in the permit renewal based on the rates required for
21 discharge to marine waters. (Declaration of Eric Schlorff, Ex. 5).

1 The limits for fecal coliform under the 1999 Permit were average monthly 200-
2 organisms/100 ml and average weekly 400-organisms/100 ml. Under the renewal permit the
3 limits were reduced to an average monthly geometric mean of 110-col/100 ml and a maximum
4 daily limit of 370-col/100 ml. (Declaration of Eric Schlorff, Ex. 2, p. 14); (Second Declaration
5 of Eric Schlorff ¶1).

6 After the renewal permit had been issued, Mr. Schlorff collected samples of the receiving
7 water adjacent to the City of Ilwaco's outfall on December 14, 2005. Multiple samples were
8 taken from four locations near the City's outfall. (Declaration of Eric Schlorff, Ex. 5). The
9 samples from three of the locations exceeded ten ppt. The 95th percentile of results from the
10 fourth sample site was 9.985 ppt. Shellfish shells were also noted in the vicinity of the outfall,
11 which Mr. Schlorff interpreted as evidence that the receiving water was marine water and not
12 fresh water. (Declaration of Eric Schlorff, Ex. 5).

13 The City of Ilwaco believes the change in Ecology's characterization of the receiving
14 water and the resulting significant reduction in fecal coliform limits is inequitable under the
15 circumstances. Ilwaco points to the fact that for the past nine years, the City has prepared plans
16 and specifications for improvements to the wastewater treatment plant based on Ecology's
17 requirement that the outfall meet fresh water criteria. The engineering design work and funding
18 arrangements were all premised on the then-existing characterization of the receiving water as
19 fresh water. Ecology approved the 1997 Wastewater Facilities Plan and the 2004 Plant
20 Expansion without any suggestion the more stringent marine water standards would need to be
21 met. The City contends a retrofit now would be much more expensive than designing to the new
standard originally. (Affidavit of Nancy Lockett). The City asserts a better approach would be

1 to incorporate the new marine criteria into future facility plans and expansions. As a result, the
2 City appealed the NPDES permit to this Board.

3 Analysis

4 Summary judgment is a procedure available to avoid unnecessary trials on formal issues
5 that cannot be factually supported and could not lead to, or result in, a favorable outcome to the
6 opposing party. *Jacobsen v. State*, 89 Wn.2d 104, 569 P.2d 1152 (1977). The summary
7 judgment procedure is designed to eliminate trial if only questions of law remain for resolution.
8 Summary judgment is appropriate when the only controversy involves the meaning of statutes,
9 and neither party contests the facts relevant to a legal determination. *Rainier Nat'l Bank v.*
10 *Security State Bank*, 59 Wn. App. 161, 164, 796 P.2d 443 (1990), *review denied*, 117 Wn.2d
11 1004 (1991).

12 The party moving for summary judgment must show there are no genuine issues of
13 material fact and the moving party is entitled to judgment as a matter of law. *Magula v. Benton*
14 *Franklin Title Co., Inc.*, 131 Wn.2d 171, 182; 930 P.2d 307 (1997). A material fact in a
15 summary judgment proceeding is one that will affect the outcome under the governing law.
16 *Eriks v. Denver*, 118 Wn.2d 451, 456, 824 P.2d 1207 (1992). All facts and reasonable inferences
17 must be construed in favor of the nonmoving party in a summary judgment. In this case, the
18 facts material to deciding the motion are not in dispute and the case is ripe for summary
19 judgment.

20 The Baker Bay area is classified by WAC 173-201A-130(20) as a Class A freshwater
21 because it falls between the mouth of the Columbia River and the Washington-Oregon border at

1 river mile 309.3.¹ However, the specific classifications in WAC 173-201A-130 are subject to
2 further analysis under the general considerations set forth in WAC 173-201A-060:

3 The following general guidelines shall apply to the water quality criteria
4 and classifications set forth in WAC 173-201A-030 through 173-201A-
140 hereof:

- 5 (1) At the boundary between waters of different classifications,
6 the water quality criteria for the higher classification shall
7 prevail.
- 8 (2) In brackish waters of estuaries, where the fresh and marine
9 water quality criteria differ within the same classification, the
10 criteria shall be applied on the basis of vertically averaged
11 salinity. The freshwater criteria shall be applied at any point
12 where ninety-five percent of the vertically averaged daily
maximum salinity values are less than or equal to one part per
thousand. Marine criteria shall apply at all other locations;
except that the marine water quality criteria shall apply for
dissolved oxygen when the salinity is one part per thousand or
greater and for fecal coliform organisms when the salinity is
ten parts per thousand or greater.

13 * * *

14 Ecology applied WAC 173-201A-060(2) to Baker Bay and determined that it qualified as
15 brackish water in an estuary. As such, marine water quality criteria would apply if the salinity
16 were ten parts per thousand or greater. The evidence presented by Ecology that Baker Bay is
17 properly considered a brackish water estuary and that the vertically averaged salinity is ten ppt or
18 greater stands un rebutted. Ilwaco has presented no scientific data challenging the ten ppt sample
19 results. In the absence of any evidence demonstrating error in Ecology's test results, the

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21 ¹ Ecology promulgated new water quality standards and submitted them to the Environmental Protection Agency (EPA) for review and approval in 2004. Apparently, EPA has not yet approved the revised regulations. Pursuant to federal regulations, until EPA acts on the proposed water quality standards, Ecology is to apply the standards promulgated in 1997. All references in this opinion are to the 1997 regulations, and not to those appearing in the 2005 published edition of the Washington Administrative Code.

1 provisions of WAC 173-201A-060(2) require the application of marine water quality criteria to
2 the Ilwaco wastewater treatment plant outfall.²

3 The City of Ilwaco will be required to meet more stringent standards under Ecology's
4 new interpretation of the receiving water's character than they anticipated during planning and
5 design of the treatment plant facilities. While the City's concern regarding this new
6 interpretation of the regulatory regime is understandable, no authority has been cited that would
7 allow Ecology to permit a violation of water quality standards on equitable grounds. In fact, the
8 Court of Appeals addressed this type of issue in the context of Ecology's regulation of air
9 emissions in *Longview Fibre v. Ecology*, 89 Wn.App. 627, 636, 949 P.2d 851 (1998) stating:

10 Further, an administrative agency's acquiescence at an earlier time does
11 not estop it from enforcing the law at a later date. *See AK-WA, Inc. v.*
12 *Dear*, 66 Wash. App. 484, 490, 832 P.2d 877 (1992) (absent express
 authority, agencies cannot waive requirement of paying prevailing wage
 rates, or acquiesce to payments below prevailing wage rate).

13 Based upon the uncontroverted evidence, the Board concludes that the water in Baker Bay is
14 properly considered brackish water of an estuary, that the vertically averaged salinity values at
15 the outfall are greater than ten ppt, and that Ecology's decision imposing marine water standards
16 for fecal coliform in this permit is correct under WAC 173-201A-060(2). Based upon the
17 foregoing analysis the Board enters the following:
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² No argument has been made that the marine water standards for fecal coliform contained in the permit have been inaccurately calculated.

1 ORDER

2 Ecology's motion for summary judgment is GRANTED. The appellant City of Ilwaco's
3 appeal is DISMISSED.

4 DONE this 23rd day of February 2006

5 POLLUTION CONTROL HEARINGS BOARD

6 William H. Lynch, Chair

7 Kathleen D. Mix

8 Phyllis K. Macleod
9 Administrative Appeals Judge